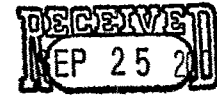


Confederated Tribes and Bands  
of the Yakama Indian Nation

NPL-033-37-09-R10  
Established by the  
Treaty of June 9, 1855

Felicia has too



September 22, 2000

Carol Browner  
U.S. EPA Administrator  
C/o Docket Coordinator  
Headquarters  
U.S. Environmental Protection Agency  
CERCLA Docket Office  
Mail Code 5201G  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460

RECEIVED

OCT 25 1999

Environmental Cleanup Office

Dear Administrator Browner,

The Yakama Nation has and continues to adamantly support EPA's decision to list the Portland Harbor site on the federal National Priorities List (NPL) of Superfund sites. Attached and hereby incorporated by reference are the May 26, 1999 comments prepared by the Columbia River Inter-Tribal Fish Commission (CRITFC) and submitted to the Oregon Department of Environmental Quality (DEQ) and EPA Region 10 in support of listing Portland Harbor on the NPL. CRITFC's May 26, 1999 comments were prepared as part of the public comment process for the Oregon DEQ's Sediment Management Plan for a state-led cleanup of Portland Harbor.

EPA Region 10's recent explanation of the proposed listing of Portland Harbor on the NPL described a split between federal and state cleanup and enforcement responsibilities such that the cleanup of upland sites will be according to Oregon's Environmental Cleanup Law and the cleanup of water sites will be according to federal law and EPA jurisdictional authorities. In addition, the Oregon DEQ will be responsible for developing a Remedial Investigation/Feasibility Study (RI/FS) for upland sites but EPA will review state decisions for compliance with federal cleanup standards and processes and consistency with federal trust obligations to the tribes.

EPA Region 10 also indicated that upland sites under state jurisdiction are not currently part of the Portland Harbor NPL Superfund site. Rather, site boundaries will be determined, years later, in EPA's Record of Decision (ROD). If EPA determines that the state-led cleanup of any upland facility meets federal cleanup standards, that upland facility will be excluded from the federal Superfund site boundary as determined in the ROD. As a result, those non-federal sites will be exempt from CERCLA provisions and authorities and may preclude natural resource trustees from bringing Natural Resource Damage Assessment (NRDA) claims for restoration of upland resources.

Post Office Box 151, Fort Road, Toppenish, WA 98948 (509) 865-5121

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USEPA SF



This proposed approach raises many concerns previously articulated by the Yakama Nation to EPA during the state deferral negotiations. Although the site is proposed for listing on the NPL, the procedural, legal, enforcement and technical effect of bifurcating cleanup responsibilities essentially equates to a state deferral of upland sites and this is unacceptable to the Yakama Nation. The Yakama Nation is concerned that the current proposed split-cleanup strategy jeopardizes the opportunity for tribal participation in state-led cleanup decisions for upland sites, weakens tribal government consultation efforts, prevents the cost-effective development and implementation of consistent upland and river-sediment cleanup standards that protect tribal people's health and treaty resources and may compromise the rights of natural resource trustees to bring restoration damage claims against upland facilities.

According to EPA and other federal policies requiring tribal government consultation, the Yakama Nation believes that EPA should have consulted with the Yakama Nation on the decision to split federal and state cleanup responsibilities. Throughout the listing process for Portland Harbor, EPA and the Oregon DEQ have consistently struggled to meet federal mandates requiring tribal government involvement and consultation and adherence to federal trust obligations to tribes. EPA has been aware of the tribe's interest in this process and made efforts to consult with the tribe on the state deferral issue. EPA Region 10 stated that the decision to give the state jurisdiction over the upland sites was based on a certain amount of political expediency to keep the listing process moving forward. Although we can appreciate the desire to avoid a political stranglehold on the process, the decision to split federal and state responsibilities is contrary to Governor Kitzhaber's commitment to support a federal listing of the Portland Harbor site.

The Yakama Nation has a duty to its tribal members to assure that treaty rights and treaty-protected resources remain protected, clean and available for future generations. Without contest, the federal government has no less of a duty to the public. The Yakama Nation has numerous tribal resolutions directly related to toxics, contaminated fish, tribal health and ecological impacts from exposure to environmental toxics, and involvement in clean up decisions for impacted areas and resources both within the Yakama Nation's reservation boundaries and within the treaty-guaranteed ceded area, which encompasses virtually the entire Columbia River Basin and includes the Willamette Falls and Lower Willamette River.

Again, the Yakama Nation fully supports listing the Portland Harbor site on the federal NPL and we look forward to continued discussions on the Portland Harbor cleanup process and how to best effectuate mutual goals and an efficient, cost-effective, long term-cleanup and demonstrated restoration of Portland Harbor, the Willamette River and treaty resources.

Thank you for the opportunity to provide these comments. Please contact Lynn Hatcher, Manager of the Yakama Nation's Fisheries Resource Program, at (509) 865-6262 if you have questions, concerns or comments.

Respectfully Submitted,

*Randy Settler*

Randy Settler

Chair

Yakama Nation Fish and Wildlife Committee

Attachment: CRITFC Comments to Oregon DEQ, May 26, 1999

Cc: Chuck Findley, EPA Region 10  
Tom Downey, Confederated Tribes of the Siletz Indians  
LeRoy Wilder, Confederated Tribes of the Siletz Indians  
Kathleen Feehan, Confederated Tribes of the Grande Ronde  
Antone Minthorn, Confederated Tribes of the Umatilla Indian Reservation  
Olney Patt, Jr., Confederated Tribes of the Warm Springs Reservation of Oregon  
Sam Penney, Jr., Nez Perce Tribe  
Don Sampson, Columbia River Inter-Tribal Fish Commission



## **COLUMBIA RIVER INTER-TRIBAL FISH COMMISSION**

729 N.E. Oregon, Suite 200, Portland, Oregon 97232

Telephone (503) 238-066  
Fax (503) 235-422

May 26, 1999

Mr. Langdon Marsh, Director  
Oregon Department of Environmental Quality  
Waste Management and Cleanup Division  
811 SW 6<sup>th</sup> Avenue  
Portland, OR 97204

Dear Mr. Marsh,

The Columbia River Inter-Tribal Fish Commission (CRITFC) appreciates the opportunity to comment on the Oregon Department of Environmental Quality's (DEQ) Draft Portland Harbor Sediment Management Plan (PHSMP).

The CRITFC was created in 1977 by resolutions of the Yakama Indian Nation, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon and the Nez Perce Tribe. The Commission is composed of the Fish and Wildlife Committees of its member tribes and provides technical, policy and legal expertise for protection of the tribes' treaty rights to take fish. The four tribes that form the Commission geographically encompass parts of the states of Oregon, Washington and Idaho.

The four Columbia River tribes have treaties<sup>1</sup> with the United States government in which the tribes reserved the right to take fish destined to pass their usual and accustomed fishing places. The tribes' usual and accustomed fishing places include, but are not limited to, approximately 2.8 million acres of reservation land and 41 million acres of ceded lands that include 31 Columbia River subbasins- all of which provide important spawning and rearing habitat and migration corridors for fish. The Willamette River is a usual and accustomed fishing area for the Columbia River tribes. To the Columbia River treaty tribes, fishing is a subsistence, religious and economic practice vital to the tribes' culture and way of life. Fishing and eating fish have been a sustained way of life for Columbia River tribes for millennium.

### **TREATY INDIAN FISHING AT WILLAMETTE FALLS**

The area at Willamette Falls is a usual and accustomed tribal fishing place where the CRITFC tribes presently harvest lamprey, spring chinook and steelhead. Historically, tribal people fished for chinook and steelhead and collected lamprey at the falls. Although the tribes continued to collect lamprey on a regular basis, they stopped fishing for chinook and steelhead in the late 1940s when returns declined as the result of increased development of the Willamette Valley. The tribal fishery for chinook and steelhead was revived in 1994 by agreement between the

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<sup>1</sup> Treaty with the Yakama, June 9, 1855, 12 Stat. 951; Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963; Treaty with the Umatilla Tribe, June 9, 1855, 12 Stat. 945; Treaty with the Nez Perce Tribe, June 11, 1855, 12 Stat. 957.

tribes and the state of Oregon.<sup>2</sup> The catch of chinook and steelhead has been limited due to high water conditions and low returns. Annual catches are generally less than 100. The collection of lamprey, also by agreement between the tribes and the state of Oregon, is several thousand annually.

Although the Willamette Falls fishing area is technically not part of the *U.S. v. Oregon* Columbia River Fish Management Plan,<sup>3</sup> there are other implications of returning Willamette fish on the plan. Under the terms of the plan, the tribes are entitled to 10,000 spring and summer chinook for ceremonial and subsistence purposes. Due to declining upriver spring chinook returns the tribes' catch has been limited and the remainder of the entitlement has come from returns to lower river hatcheries (primarily Willamette River spring chinook hatcheries). The tribal catch at Willamette Falls does count towards the 10,000 fish entitlement. The tribes also take spring chinook from hatcheries on an annual basis for consumption. In some years, the number of hatchery spring chinook taken by the tribes is several thousand.<sup>4</sup>

The Portland Harbor is an important migration corridor and habitat for these and several other treaty protected anadromous and resident fish species. Similarly, the Columbia River mainstem at the confluence of the Willamette River down to the estuary and Pacific Ocean provide critical habitats and migration corridors for the tribes' treaty protected Columbia River Basin fisheries. The migration and ultimate deposit of contaminated Harbor sediments and upstream sediments and pollutants into the mainstem Columbia River and estuary are of great concern to CRITFC's member tribes.

Consequently, the CRITFC tribes have a great interest in assuring that the methodologies, criteria and standards used to define the cleanup site area and the extent and level of remediation are adequate to protect the health of Columbia River tribal members who consume fish from the Willamette and Columbia Rivers or otherwise utilize the Harbor and surrounding areas as well as assure protection of the treaty fishery resource itself.

#### **CRITFC RECOMMENDATIONS TO EPA AND DEQ**

In coordination with the tribes, CRITFC provides these recommendations to protect the tribes' human health and natural resource interests, to assure that federal trust obligations to tribes are met and to preserve the tribes' rights as Natural Resource Trustees. CRITFC strongly recommends the following regarding cleanup of the Portland Harbor:

- 1) The U.S. Environmental Protection Agency list the Portland Harbor on the National Priorities List in accordance with the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)<sup>5</sup>
- 2) The U.S. Environmental Protection Agency be the lead Agency responsible for overseeing and enforcing site cleanup in accordance with CERCLA<sup>6</sup> and

<sup>2</sup> Agreement for Tribal Fisheries for Willamette River Spring Chinook. Spring 1994.

<sup>3</sup> *U.S. v. Oregon*, Civil No. 68-513-MA. D. OR. Oct. 7, 1988.

<sup>4</sup> 1996 All Species Review. Columbia River Fish Management Plan. *U.S. v. Oregon*, Technical Advisory Committee, Table 1, Spring Chinook section. August 4, 1997.

<sup>5</sup> 42 U.S.C.A. § 9605 (1980).

<sup>6</sup> 42 U.S.C.A. § 9601 to 9675 (1980)

- 3) The Oregon Department of Environmental Quality and the U.S. Environmental Protection Agency continue to coordinate efforts to expedite cleanup of contaminated Harbor sediments and sites in accordance with CERCLA.<sup>7</sup>

The following discussion supports CRITFC's recommendations. These three recommendations will not change even if the PHSMP were to meet all of EPA's requirements. CRITFC supports a federal cleanup under federal law. Furthermore, since CRITFC recommends that DEQ and EPA work cooperatively to address local and regional issues, CRITFC's specific comments on issues raised in the PHSMP are intended to apply equally to a federal cleanup process and should not be construed as CRITFC's recommendations for meeting state deferral requirements. CRITFC intends for EPA to adopt these comments in its coordination with the state to develop a cleanup strategy that is consistent with federal trust obligations, protective of tribal health and treaty protected resources and will overall, be the most protective of human health and the environment.

## DISCUSSION

To justify an EPA decision to grant the state a deferral in the cleanup process, DEQ's PHSMP must address several deferral criteria as identified by EPA<sup>8</sup>: 1) the site area must be greater than the immediate 6 miles of the Harbor currently under site assessment the; 2) state must have the authority and resources to conduct a CERCLA level-of-protection investigation and clean up of the Harbor; 3) an enforcement strategy against responsible parties to implement clean up; 4) financial support for community involvement and; 5) preservation of the rights of Federal Natural Resource Trustees.

## INDIAN TREATY RIGHTS

Regardless of these state requirements, the U.S. Constitution states that treaties with Indian tribes and the United States are like treaties with any other foreign nation and are the "Supreme law of the land,"<sup>9</sup> that cannot be abrogated without specific Congressional action. Furthermore, courts have concluded that the tribes' treaty right to take fish includes the right to have fish to take<sup>10</sup> and that the treaty right to take fish would be meaningless if the fish resource were permitted to diminish because of industrial development and pollution.<sup>11</sup> More specifically, the courts have

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<sup>7</sup> 42 U.S.C.A. § 9621(f)(1980)

<sup>8</sup> Letter from Chuck Clarke, Administrator, U.S. EPA Region 10 to Langdon Marsh, Director, Oregon DEQ, March 10, 1999.

<sup>9</sup> United States Constitution, Art. VI, cl.2.

<sup>10</sup> Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443, 678 (1979).

<sup>11</sup> United States v. Washington, (Phase II), 759 F.2d, 1353 at 1367, 1370 (1985), where the issue of environmental right to adequate fish habitat was dismissed without prejudice). See, United States v. Washington (Phase I), 520 F.2d 676, 685 (9th Cir. 1975). See also, United States v. Winans, 198 U.S. 371 (1905); Confederated Tribes of the Umatilla Indian Reservation v. Callaway, No. 72-211 (D.Or. August 17, 1973); Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F.Supp. 533, 555-556, (D.Or. 1977); Muckleshoot Indian Tribe v. Hall, 698 F.Supp. 1504, 1515-1517, Wash. 1988).

affirmed that the treaty right to take fish also secured to the tribes the continued existence of those biological conditions necessary to support the fish that are the subject matter of the treaties.<sup>12</sup> Thus, the courts have directed federal agencies to use their authorities in such a way that will protect and not degrade treated protected fish habitat.

### FEDERAL TRUST RESPONSIBILITY

As a federal agency, the U.S. EPA must use its authority in accordance with the federal trust responsibility. Originating in Cherokee Nation v. Georgia,<sup>13</sup> the federal trust responsibility is a special relationship between the United States and Indian tribes. In Cherokee Nation, the Supreme Court framed this relationship by describing Indian tribes as "domestic dependent nations," and further described the tribes' relation to the United States as resembling that of a "ward to his guardian."<sup>14</sup> This federal trust responsibility laid the foundation for federal Indian law and continues to require federal agencies to adhere to strict fiduciary standards in their relationship with Indian tribes.<sup>15</sup>

In situations such as the development of sediment quality criteria for water bodies that are off tribal reservations and are part of the tribes' treaty guaranteed fishery, the court in Northern Cheyenne Tribe v. Hodel<sup>16</sup> accurately described the federal duty by stating that, "a federal agency's trust obligation to a tribe extends to actions it takes off a reservation that uniquely impact tribal members or property on a reservation."<sup>17</sup> In Northern Cheyenne, the Secretary of Interior attempted to prevent its coal leasing Environmental Impact Statement from being invalidated by alleging that the Secretary did not have to consider the impacts such coal leasing would have on the tribe and that the decision to lease the coal was in the "national interest" and "vital to the nation's energy future."<sup>18</sup> The court further stated:

The Secretary's conflicting responsibilities and federal actions taken in the "national interest," however, do not relieve him of his trust obligations. To the contrary, identifying and fulfilling the trust responsibility is even more important in situations such as the present case where an agency's conflicting goals and responsibilities combined

<sup>12</sup> Kinitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F.2d 1032 (9th cir. 1985); United States v. Adair, 723 F.2d 1394 (9th Cir. 1984).

<sup>13</sup> 30 U.S. (5 Pet.) 1 (1831).

<sup>14</sup> *Id.* at 17.

<sup>15</sup> See United States v. Creek Nation, 295 U.S. 103 (1935). See also, Northern Cheyenne Tribe v. Hodel, 12 Indian L. Rep. 3065, 3070-71 (D. Mont. 1985).

<sup>16</sup> 12 Indian L. Rep. 3065. (D. Mont. 1985).

<sup>17</sup> *Id.* at 3071.

<sup>18</sup> *Id.*

with political pressure asserted by non-Indians can lead federal agencies to compromise or ignore Indian rights.<sup>19</sup>

Accordingly, in developing cleanup standards, especially risk-based standards, and oversight leadership for remediation of contaminated sites in the Portland Harbor, the U.S. EPA must uphold this standard and give full consideration to Indian treaty rights and resources. For the Columbia River tribes, this equates to giving full consideration to and accounting of the tribes' treaty right to take fish and to take fish that are safe to eat. Indian tribes with treaty protected resources should be afforded the greatest protection under federal agency policies.

*EPA cannot defer these trust obligations to any state.* A state deferral for cleaning up the Portland Harbor will place treaty guaranteed rights and federal trust obligations at Oregon's discretionary authority. Indeed, the protection of tribal interests and treaty resources should be implemented beyond a state's general and discretionary policies regarding Indian tribes and treaty resources. The state's discretion is exemplified in the fact that the state's PHSMP does not address how tribal governments will be involved or coordinated with.

EPA has an obligation to maintain government-to-government relations with Indian tribes when implementing federal environmental laws and environmental management programs, including cleanup efforts and deferral decisions under CERCLA. In addition to federal and Constitutional law, EPA's 1984 policy states that:

In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace.<sup>20</sup>

The CRITFC tribes are ceremonial, subsistence and commercial fishers who consume significantly more fish than the average individual.<sup>21</sup> Exposure to toxic chemicals from consuming contaminated fish is of specific concern to the Columbia River tribes, their environments and the health and welfare of tribal members. The development of cleanup standards requires the EPA to consult with the tribes on a government-to-government basis and to adhere to principles of treaty rights and honor its federal trust responsibility to the tribes.

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<sup>19</sup> *Id.* (citations omitted).

<sup>20</sup> EPA Policy for the Administration of Environmental Programs on Indian Reservations, November 8, 1984. *See also*, President Clinton, "Memorandum on Government-to-Government Relations with Native American Tribal Governments", 59 Fed. Reg. 85 (1994).

<sup>21</sup> A Fish Consumption Survey of the Umatilla, Nez Perce, Yakama, and Warm Springs Tribes of the Columbia River Basin, CRITFC Technical Report, 94-3, October 1994.



## RIGHTS OF NATURAL RESOURCE TRUSTEES AND TRIBES

Responsible parties are liable to tribes for destruction of natural resources.<sup>22</sup> With a state deferred cleanup, the rights of Federal Natural Resource Trustees, such as tribes, becomes questionable and uncertain.<sup>23</sup> Whereas Federal law requires EPA to coordinate with Trustees and tribes on coordinating assessments, investigations and planning of site cleanup, the state deferral would ideally require State-trustee/tribal MOUs to assure Trustee/tribal rights are preserved. Although such MOUs with tribes should preserve tribal rights by describing the tribe's government-to-government relationship in all aspects of the site assessment and cleanup as well as assure tribal participation by providing necessary funding DEQ is not obligated to assure this. Indeed, DEQ recognizes the need for funding to support tribal participation, but is non-committal in assuring funds are available. An MOU arrangement with the state will not hold the force and effect of direct federal responsibilities to tribes.

## DEFINING THE CLEANUP SITE

DEQ defines "site" as a current or future cleanup site that may extend to any other portion of the river where contaminants released from the site could come to be located.<sup>24</sup> Despite this and EPA's requirement, DEQ is focusing the PHSMF on only the 6 mile stretch of the Portland Harbor as the "Harbor area" or "site." "Reference areas" will include locations within the lower Willamette River from Willamette Falls (RM 26.6) to the Columbia River confluence at RM 0, excluding the Harbor area or the Columbia River itself, that are presumably unaffected by site-related contaminants. DEQ cannot presume that downstream areas are unaffected by Harbor sediments. Harbor sediments move downstream to the mainstem Columbia River, the lower estuary and the Pacific Ocean.<sup>25</sup>

In violation of the federal Clean Water Act and CERCLA, EPA and DEQ have allowed levels of toxic pollutants in toxic amounts into the Willamette and Columbia Rivers. The Great Lakes was an important lesson<sup>26</sup> and the tribes do not want the Columbia River to be next. Portland Harbor contaminants are not stationary, nor are the migratory fish species that use the Harbor. In fact, numerous state and federal studies have consistently documented unacceptably high level of dioxins, furans, heavy metals, organochlorine pesticides, PCBs, DDT and radionuclides throughout the Columbia River Basin.<sup>27</sup> Clearly, federal and state permitted pollution by

<sup>22</sup> 42 U.S.C.A. §9607 (f)(1) (1980)

<sup>23</sup> Letter from Chuck Clarke, Administrator, U.S. EPA Region 10 to Langdon Marsh, Director, Oregon DEQ, March 10, 1999.

<sup>24</sup> Oregon Administrative Rules (OAR) 340-122-115 (26), (34), 1997.

<sup>25</sup> Dredging in the Portland Harbor, Portland-Vancouver Metropolitan Area, Water Resources Study, U.S. Army Corps of Engineers, Portland, Oregon, 1979. See the PHSMF, Appendix G, page G-24.

<sup>26</sup> Kyle, Amy D., *Contaminated Catch, The Public Health Threat from Toxics in Fish*, Natural Resources Defense Council, April 1998, Table A-10, pgs. 123-150. The report identifies all of the Great Lakes as having fish consumption advisories issued for one or more of the following substances: mercury; PCBs; chlordane; DDT; dieldrin; dioxins.

<sup>27</sup> Oregon Department of Environmental Quality, 1992, Oregon's 1992 Water Quality Status Assessment Report, 305 (b) Report, Portland, Oregon, April 1992. See, Tetra Tech, 1993, *Reconnaissance Survey of the Lower Columbia River, Task 6: Reconnaissance Report, Vol. 1*, See, U.S. Environmental Protection Agency, Region 10, (1992), *Columbia River Water Quality Summary Report*, Portland, Oregon, June 26, 1992. See, U.S. Environmental Protection Agency, (1992), *National Study of Chemical Residues in Fish, Volumes 1 and 2*, USEPA 823-R-92-008, Office of

industrial sources and land use practices continue to pollute the Columbia River Basin environment in violation of the Clean Water Act. In addition to the Harbor industries, other sources include stormwater and combined sewer overflow outfalls, pulp and paper mills, aluminum plants, land use practices, especially pesticide and herbicide applications and nuclear wastes.

CRITFC requests DEQ to expand the geographic scope of the site assessment and potential cleanup to include upstream areas, including at least Willamette Falls and areas downstream of Harbor facilities, including the lower portions of the Willamette River, and the Columbia River. Additional sediment analysis should be obtained from the Columbia River at areas upstream of the confluence and downstream to the estuary and immediate portions of the Pacific Ocean. Contaminant problems in the Columbia River from Harbor pollutants would require a bi-state effort with Washington. A bi-state effort may create a less centralized more bureaucratic cleanup effort than would be experienced under EPA's centralized lead. Addressing upstream areas will assist in source identification and provide information on contaminant fate and transport.

### ENVIRONMENTAL JUSTICE and TRIBAL FISH CONSUMPTION

Regarding tribal fish consumption, DEQ states that a tribal subsistence scenario is not proposed for the Portland Harbor because:

"there are no known tribal fisheries within the Harbor area. However, should such a scenario be deemed appropriate, tribal consumption rates for the region should be estimated from a study of consumption rates among Columbia River tribes (CRITFC, 1994<sup>28</sup>; Harris and Harper, 1997<sup>29</sup>), although it is likely that these studies would greatly overestimate tribal fishing within the relatively industrialized Portland Harbor area. However, tribal consumption rates in the Pacific Northwest (CRITFC, 1994; Toy et al., 1996<sup>30</sup>) are similar to those of other shoreside anglers included in consumption surveys (e.g., Landolt et al., 1987<sup>31</sup>). Therefore, tribal fishermen would likely be protected by the subsistence exposure scenario described above."<sup>32</sup>

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Science and Technology. USEPA. Washington, D.C., September, 1992. See, U.S. Geological Service. 1993. *Persistence of the DDT Pesticide in the Yakima River Basin. Washington - National Water Quality Assessment*. U.S. Government Printing Office, Washington, D.C. See, Washington State Department of Ecology. 1992. 1992 Statewide Water Quality Assessment, 305(b) Report. Publication #92-04.

<sup>28</sup> CRITFC. A Fish Consumption Survey of the Umatilla, Nez Perce, Yakama, and Warm Springs Tribes of the Columbia River Basin. Columbia River Inter-Tribal Fish Commission, Portland, OR. Technical Report 94-3 (1994)

<sup>29</sup> Harris, S. and B.L. Harper A Native American Exposure Scenario. *Risk Analysis* 17(6):789-795, 1995

<sup>30</sup> Toy, K.A., N.L. Polissar, S. Liao, and G.D. Mittelstaedt. A Fish Consumption of the Tulalip and Squaxin Island Tribes of the Puget Sound Region, 1996.

<sup>31</sup> Landolt, M., D. Kalman, A. Nevissi, G. van Belle, K. Van Ness, and F. Hafer. Potential Toxicant Exposure among Consumers of Recreationally Caught Fish from Urban Embayments of Puget Sound. NOAA Technical Memorandum NOS OMA 33. Rockville, MD. 1987.

<sup>32</sup> PHSMP. Appendix G, page G-116.

CRITFC requests that the CRITFC fish consumption survey and the Harris and Harper tribal fish consumption studies be used to adequately develop a tribal consumption scenario for the purpose of developing target fish tissue levels intended to be protective of the health of tribal members. CRITFC and the tribes should be requested to provide additional information on how best to utilize these studies to further determine the geographic scope of the cleanup site and contaminants of concern.

Furthermore, CRITFC requests that determinations made regarding tribal fish consumption be wholly consistent with federal trust obligations and federal and state environmental justice policies

The United States government has appropriately recognized widespread violations of Title VI of the Civil Rights Act of 1964<sup>33</sup> in the development and implementation of environmental programs. Title VI states that:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.<sup>34</sup>

Title VI applies to state programs supported by federal funding, such as state administration of the Clean Water Act and development of sediment criteria. Title VI directly prohibits intentional discrimination but also protects against discriminatory *effects* from seemingly neutral regulations and policies.

In his 1994 Executive Order entitled, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,"<sup>35</sup> President Clinton highlighted the United State's commitment to upholding Title VI specifically for Federally-funded programs that affect human health or the environment. Under section 4-4 of this Executive Order, President Clinton specifically identifies the need to evaluate human health risks from subsistence consumption of contaminated fish and wildlife.<sup>36</sup>

Clearly, the United States has recognized EPA's obligation under Title VI and President Clinton's Executive Order to prevent discriminatory effects to subsistence fish and wildlife consumers. For the Columbia River tribes who are subsistence fishers, and who consume significantly more fish than the general population, from waters known to be overly contaminated with highly toxic pollutants, EPA has a duty under principles of tribal sovereignty, treaty rights, federal trust responsibility and the EPA's own policies to give full consideration to tribal consumption data

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<sup>33</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, Title VI, Sec. 601, 78 Stat. 252 (1964).

<sup>34</sup> *Id.*

<sup>35</sup> Exec. Order No. 12898, 59 Fed. Reg. 7629-7633 (1994).

<sup>36</sup> *Id.*

and to consult with the tribe on a government-to-government basis before making risk management decisions under CERCLA.

### **FISH IMPACTS and ENDANGERED SPECIES**

Emerging evidence on the uptake of chemicals by juvenile salmon<sup>37</sup> and egg fry<sup>38</sup> as well as adverse impacts to returning adults<sup>39</sup> dictates continued examination of impacts to salmon from toxic substances.<sup>40</sup> CRITFC greatly supports further examination of impacts to juvenile salmonids from exposure to toxic contaminants and requests that DEQ keep CRITFC informed regarding the development of a technical work group to examine these type of impacts.

DEQ does not adequately address how endangered and threatened species will be protected by the state's proposed cleanup plan. Under section 7 of the Endangered Species Act,<sup>41</sup> EPA would have to consult with the National Marine Fisheries Service (NMFS) on the impact the cleanup would have on endangered and threatened species.

CRITFC requests that a comprehensive analysis been done to assure that endangered and threatened species are not adversely impacted. CRITFC also proposes that an EPA decision to defer cleanup to the state is a major federal action as defined under the National Environmental Policy Act (NEPA) and would require an Environmental Impact Statement.<sup>42</sup>

### **DEQ REGULATORY AUTHORITY**

Regarding DEQ's authority and resources to implement a CERCLA level investigation and cleanup and the inclusion of adequate enforcement strategies, DEQ will be guided by Oregon's 1987 Environmental Cleanup Law.<sup>43</sup> As a general consideration, the current condition of the Portland Harbor is evidence that DEQ has not adequately implemented and enforced existing environmental and cleanup laws. The historical loading of pollutants has not been adequately addressed by DEQ. Although many sites are no longer in operation, DEQ has not pursued an aggressive clean up strategy, and in some cases, on-site stockpiles of contaminants remain. DEQ

<sup>37</sup> McCain, B.B., D.C. Malins, M.M. Krahn, D.W. Brown, W.D. Gronlund, L.K. Moore, and S-L. Chan. "Uptake of Aromatic and Chlorinated Hydrocarbons by Juvenile Chinook Salmon (*Oncorhynchus tshawytscha*) in an Urban Estuary." Arch. Environ. Contam. Toxicol. 19, 10-16 (1990). See, "Proceedings of the Roundtable on Contaminant-Caused Reproductive Problems in Salmonids," edited by Michael Mac, International Joint Commission, Great Lakes Science Advisory Board's Biological Effects Subcommittee of the Ecological Committee, Windsor, Ontario, Sept. 24, 25, 1990.

<sup>38</sup> Raloff, Janet. "Those Old Dioxin Blues." Science News. Vol. 151, pgs. 306-307, May 17, 1997.

<sup>39</sup> Arkoosh, Mary R., Demundo Casilla, Ethan Clemons and Anna N. Kagely, Robert Olson and Paul Reno, John E. Stein. "Effects of Pollution on Fish Diseases: Potential Impacts on Salmonid Populations," Journal of Aquatic Animal Health 10:182-190, 1998. Also, Damkaer, David M. and Douglas B. Dey, "Evidence of Fluoride Effects on Salmon Passage at John Day Dam, Columbia River, 1982-1986," North American journal of Fisheries Management 9:154-162, 1989.

<sup>40</sup> Ewing, Richard D., Diminishing Returns: Salmon Decline and Pesticides. Oregon Pesticide Education Network, Feb. 1999

<sup>41</sup> 16 U.S.C.A. § 7 (1973).

<sup>42</sup> 42 U.S.C.A. § 4332 (C) (1969)

<sup>43</sup> Oregon Revised Statutes (ORS) 465-200 et. Seq.) 1987.

regulatory complacency against Harbor facilities, CRITFC points to the fact that Rhone Poulenc, a pesticide manufacturer from 1943-1990, entered into a consent order with DEQ in 1989. After eight years, Rhone Poulenc accomplished nothing as agreed. DEQ finally terminated the consent order in 1998 after eight years of regulatory complacency against a known violator.<sup>43</sup>

Cleanup under both CERCLA and the state's Environmental Cleanup Law are risk-based. Under CERCLA, selection of cleanup remedies is based on the National Contingency Plan (NCP)<sup>44</sup>. CRITFC is favorable to the federal process under the NCP, which requires that remedies meet two criteria: 1) overall protection of human health and the environment, and 2) compliance with applicable or relevant and appropriate requirements (ARARs) such as the Safe Drinking Water Act and the Clean Water Act. CRITFC recommends EPA and DEQ coordinate to assure that the risk-based standards used in the cleanup are the most protective of human health and the environment, be it a state or a federal standard or criteria.

Regarding coverage of petroleum and oil,<sup>45</sup> which is a prevalent contaminant in the Harbor, DEQ's stated advantage is misleading. The Oil Pollution Act of 1990,<sup>46</sup> which allows for remediation, compensation and liability for oil and petroleum substances, applies regardless of CERCLA's exclusion.

### **DREDGING**

The State of Oregon has a great economic interest in and bias toward dredging. This is evident in their description of objectives for protecting the benthic community and supporting commercial activity in the Harbor:

A healthy benthic community is a protected beneficial use. Clean sediment (i.e., those that do not restrict dredging or other commercial activities) can be identified by a lack of response in the benthic invertebrate community to contaminants in sediment. Dredging is a necessity to maintain the commercial viability of Portland Harbor. However, the presence of contaminated sediments in a working, urban harbor can greatly increase the complexity and cost of routine maintenance dredging, and may, in extreme cases, prevent dredging all together. Contaminated sediments may also adversely affect dredging for new construction or other capital improvement projects. Contaminated sediment impairs beneficial uses in the Harbor by directly impacting the benthos and by potentially placing restrictions on dredging activities, as well as adding costs to agriculture (e.g., through increased shipping charges for bulk commodities) and industry.<sup>47</sup>

<sup>43</sup> PHSMP, Appendix E, page E-11

<sup>44</sup> Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C.A. § 9605 (1980).

<sup>45</sup> ORS 340-122-115 (30)(c) (1997).

<sup>46</sup> Oil Pollution Act of 1990, 33 U.S.C.A. § 2701 to 2761 (1990).

<sup>47</sup> PHSMP, Appendix G, page G-35.

DEQ further states that dredging in the lower Willamette River has been a commonplace historical activity and "will be an ongoing necessity for the foreseeable future."<sup>48</sup> Statements such as these do not allow for much consideration of non-dredge options. Furthermore, DEQ identifies three activities that will result in increased resuspension of contaminated sediments: 1) high flows 6 months of the year (Nov.- April); 2) ship and vessel traffic, and 3) dredging. Ship and vessel traffic and dredging are commonplace occurrences in the Lower Willamette and Columbia Rivers and therefore, resuspension of contaminated sediments will likely occur on a regular basis, making those contaminants bioavailable to the aquatic environment.

It appears that DEQ is not adequately coordinating with proposed Corps dredging activities other than to assure that Corps activities are not impeded. All issues related to cleaning up the Portland Harbor must be fully addressed before any future Corps dredging activities are approved in the Harbor or in upstream/downstream areas, including the Columbia River.

CRITFC recognizes the importance of coordinating the PHSMP with the Corps of Engineers' proposed dredging activities for the lower Willamette and Columbia Rivers and incorporates by reference, CRITFC's comments on the draft EIS for that dredging project (Attachment A) and the U.S. Fish and Wildlife Service's (USFWS) draft Coordination Act Report (Attachment B). In particular, the Corps' EIS and the USFWS' draft Coordination Report do not address the environmental impacts from dredging sediments contaminated with toxics.

## **REMEDIAL OPTIONS**

CRITFC supports remedial options that will result in long-term remediation and clean up of a site. Sediments containing hazardous substances should be properly disposed of in a permitted hazardous waste landfill. No remediated sediment should be disposed of in such a way that those sediments will re-enter the aquatic environment nor should they be "re-cycled" into other land or industrial uses. CRITFC does not support short-term options such as "capping" contaminated sediments with clean sediments. CRITFC does not support natural recovery or biodegradation options for sediments contaminated with persistent, bioaccumulative toxics or those toxics that breakdown into more persistent, bioaccumulative toxics.

To the CRITFC tribes, the state of the Willamette and Columbia Rivers is symptomatic of inadequate implementation of good environmental laws that have existed for decades, but have been hindered by economic interests and endless scientific debate. The continued emissions of persistent, bioaccumulative toxics must end and contaminated areas must be cleaned up with long-lasting solutions, not short term and "cost-effective" ones. EPA has adequate scientific evidence and authority to support these regulatory cleanup actions.

CRITFC supports a "no acceptable risk" and "zero emission" policy on bioaccumulative, persistent toxic substances, especially into fish bearing waters. Consequently, CRITFC calls upon the DEQ and EPA to implement direct regulatory action that eliminates further discharges of these substances into the Willamette and Columbia River systems. Because a CERCLA level problem exists in the Harbor, EPA and DEQ should place an immediate emission moratorium on those Harbor industries that continue to emit toxic substances into the Harbor. EPA and DEQ

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<sup>48</sup> PHSMP, Public Draft, page 85.

need to implement pollution prevention policies and technologies that will prevent the release of persistent, bioaccumulative toxics.

CRITFC maintains that risk assessments have no useful purpose for making regulatory decisions for persistent, bioaccumulative toxics, known carcinogens, "probable human carcinogens," and substances known to cause reproductive, developmental or neurological effects. The science is always debatable and risk assessment involves inherent uncertainties. CRITFC recognizes that for those substances that do not meet any of these effects criteria, risk assessment methodologies should be conservative and as protective of human health as possible. Thus CRITFC's comments related to risk assessment are made in context of this position. Furthermore, CRITFC disagrees with DEQ's interpretation of chemistry and bioassay results such that no further assessment will be done on those contaminants in sediment that are not bioaccumulative.<sup>49</sup> Impacts to the benthic community should be assessed in relation to the level of contamination. Non-bioaccumulative contaminants may have adverse effects in high concentrations.

In 1990, the Yakama Indian Nation passed a resolution calling for the elimination of organochlorine pollution by the pulp and paper industry.<sup>50</sup> Because tribal members are and will be one of the ultimate receivers of the environmental and biological fate and transport of persistent, bioaccumulative toxics, CRITFC urges EPA and DEQ to stop balancing human health and the environment with risk management and cleanup decisions tainted by economics and politics.

Many highly toxic chemicals, especially organochlorines, do not remain in the water column but "separate" into the sediment and bind to organic matter in the aquatic environment and are subsequently uptaken through the food chain. Therefore, EPA and DEQ must develop sediment quality guidelines and these must be protective of tribal and other sensitive populations that are exposed to those sediments in ways the general population may not be.

Multiple exposures to multiple chemicals must, at a minimum, be considered additive, and the presence of persistent bioaccumulative toxics needs to be factored in when assessing multiple chemical exposures from different or same sources. EPA should use the best science on synergistic impacts from exposure to a combination of chemicals. Sensitive sub-populations, such as the Columbia River tribes, may have significant confounding, underlying health problems that must be recognized with any synergistic assessment.

In sum, EPA must maintain government-to-government relations with Indian tribes when implementing federal environmental laws and environmental management programs, including CERCLA. CRITFC urges the EPA to adhere to principles of treaty rights and honor its federal trust responsibility to the tribes in considering its decision to defer cleanup of the Portland Harbor to the State of Oregon.

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<sup>49</sup> PHSMP, Appendix G, Table G-4, page G-38.

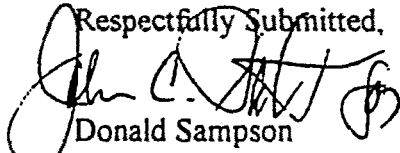
<sup>50</sup> Yakama Tribal Council Resolution T-40-90, January 18, 1990.

CRITFC believes that the state's PHSMP does not adequately address the following criteria as required by EPA:

- Preservation of the tribes' treaty rights and federal trust obligations.
- Preservation of Federal Natural Resource Trustees.
- Protection of endangered and threatened species
- Adequate expansion of the site area beyond, upstream and down stream of the immediate 6 miles of the Harbor currently under site assessment.
- An enforcement strategy against responsible parties to implement clean up.
- Financial support for community and tribal involvement.
- Resources to conduct a CERCLA level-of-protection investigation and clean up of the Harbor.
- Coordination with Corps of Engineers dredge projects.
- Management options that do not include dredging.

For these reasons, CRITFC urges the U.S. EPA to list the Portland Harbor as a Superfund Site under CERCLA and that the U.S. EPA maintain lead jurisdiction over the cleanup, with continued coordination with DEQ. CRITFC supports a federal cleanup under federal law and intends for EPA to adopt these comments in its coordination with the state to develop a cleanup strategy that is consistent with federal trust obligations, protective of tribal health and treaty protected resources and will overall, be the most protective of human health and the environment.

Respectfully Submitted,

  
Donald Sampson  
Executive Director

Cc: Chuck Clarke, Administrator, U.S. EPA Region 10

Enclosure